UNITED
NATIONS

TD

United Nations Conference
on Trade and Development

Distr.
GENERAL

TD/B/1311
TD/B/C.4/341
TD/B/C.4/ISL/59
4 June 1992

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD

REPORT OF THE WORKING GROUP ON INTERNATIONAL SHIPPING LEGISLATION ON ITS THIRTEENTH SESSION

Held at the Palais des Nations, Geneva,
from 11 to 19 November 1991

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GE.91-51194/4577B

INTRODUCTION

1. The thirteenth session of the Working Group on International Shipping Legislation was held at the Palais des Nations, Geneva, from 11 to 19 November 1991. In the course of the session, the Working Group held five plenary meetings. This report gives a brief account of the proceedings of those meetings.

Chapter I

GENERAL AVERAGE

(Agenda item 3)

2. For its consideration of this item, the Working Group had before it the following document:

"General average: a preliminary review" - report by the UNCTAD secretariat (TD/B/C.4/ISL/58).

3. The Director of the Shipping Division referred to the origins of the general average system in Mediterranean trade approximately 3,000 years ago, at a time when it was customary for merchants to travel with their cargoes, buying, selling and bartering the goods as the voyage progressed. In those days of small vessels, probably carrying as few as half a dozen shipments on each voyage, settlements for general average were relatively simple. The general average system fulfilled a very useful function, for the merchants had probably invested the bulk of their fortune in the one adventure and there was no insurance to protect them against loss. However, the scope of general average had been greatly expanded since those times and, quoting the leading British authority on the subject, he observed that objections to the system during the past 125 years had been due to the ever-increasing number of situations which had been held to be the proper subject of general average.

4. He pointed out that in current shipping practice, with modern general cargo or containerships carrying hundreds or even thousands of shipments belonging to different shippers, the settlements of general average entailed a great deal of time and expense. Such a situation had given rise to dissatisfaction and repeated calls for abolition of the general average system altogether or for its extensive reform, as had been demonstrated by the secretariat's report.

5. In conclusion, he referred to the recommendations made in the secretariat's report that it would be premature for the Working Group to consider questions of simplification or reform of general average until the technical problems had been thoroughly discussed by the insurance industry with a view to determining whether new insurance arrangements could be found to replace the existing general average system. If the enquiries proved that new insurance arrangements could provide a more efficient and less costly substitute for general average, then investigations would have to be made of the best means of effecting its abolition. If, on the other hand, the insurance interests were to conclude that there was no viable insurance solution it would then be appropriate for the Working Group to consider questions of simplification, reform or revision of the general average system and the York-Antwerp Rules. He invited the Working Group to consider this proposal.

6. The spokesman for Group B (United Kingdom) said that his Group had studied with interest the secretariat's report, which provided an interesting and informative general overview of the general average system, including the provision of a historical perspective on the evolution of the concept of general average and the York-Antwerp Rules, as well as a review of the criticisms, amendments and alternative proposals which had occurred since the late 1800s.

7. He observed that general average did not appear to have been a matter of any governmental or intergovermental concern over the years. Although initially intended for enactment in national law, only a very restricted number of maritime codes provided that, in the absence of any contrary stipulations by the parties, the York-Antwerp Rules applied to contracts for the carriage of goods by sea. By and large, general average and the York-Antwerp Rules had been seen as a commercial matter which governments had left to commercial parties, notably to the Comité Maritime International (CMI). The York-Antwerp Rules were applied to most contracts for the carriage of goods by sea and they were therefore of some commercial significance and dispute, however slight. He recalled that CMI had assumed responsibility for the Rules in 1924 and since then had enacted amendments in 1950, 1974 and 1990. In comparison with most internationally agreed conventions or rules, the York-Antwerp Rules had been updated or amended in the light of current circumstances and practices. The voluntary adoption of the Rules provided great flexibility so that they could be revised relatively quickly if there was a desire to do so. There had been little criticism of CMI's stewardship. CMI was considering updating or reviewing the Rules at its 1994 conference and a CMI international subcommittee was currently considering the subject.

8. In the view of Group B, UNCTAD could contribute significantly in revisiting the subject and, in close consultation with CMI, IUMI and other international organizations, provide recommendations - if deemed necessary - on the extent to which, for example, new insurance arrangements could possibly modify general average or parts thereof, and evaluate the effects of any such insurance arrangements upon insurance and freight rates to be borne by the commercial parties. The secretariat could submit its findings for consideration by the Working Group at its fourteenth session. Furthermore, Group B felt that the UNCTAD secretariat and the subgroup of experts could contribute significantly to the ongoing work of the CMI international subcommittee on the review and simplification of the current York-Antwerp Rules.

9. Group B considered that any proposal to abolish general average would have to come from, and be agreed by, the commercial parties involved, who would have to bear the financial implications of such an action. Group B felt strongly moreover that the subgroup of experts established at the current session of the Working Group should deal solely with the substantive point of general average and that the issue of further work by UNCTAD in this field, and in particular the resolution, should be discussed in plenary or by a negotiating group set up by the Chairman of the session.

10. He considered that any amended system of general average should meet the following requirements:

(a) It should retain the current equitable balance between the commercial interests;

(b) A change could come about only if the ship and cargo interests actively desired it;

(c) Ship and cargo interests would want abolition only if they were placed in as good a financial position under any new system as they enjoyed at present;

(d) Insurance and freight rates were not increased.

11. The spokeswoman for the Group of 77 (Nigeria) said that her Group fully subscribed to the findings of the secretariat's report. She noted that, although the concept of general average was based on the relatively simple principle of equity, in practice over the centuries this simple principle had reached such a stage of complexity that the whole concept required serious reconsideration.

12. Today the adjustment of general average could take several years, and in cases affecting thousands of different cargo interests it could take up to 10 years and involve exorbitant expense. The delays and costs involved in the process were the cause of many complaints by the parties concerned. Furthermore, for developing countries there were additional problems that could cause more complications and delays: the provision of security, the collection of general average contributions and foreign-exchange controls. Another important factor was the lack of relevant expertise: the profession of average adjuster did not exist in most developing countries.

13. Although the York-Antwerp Rules were widely adopted through their incorporation in charter parties, bills of lading and policies of marine insurance, they were not always interpreted in the same way by the courts and average adjusters in different countries. Furthermore, the Rules did not cover all aspects of general average. Thus issues such as the position of average adjusters, limitation period or time within which an action to enforce a general average contribution could be brought, and handling of dangerous cargo did not come within the Rules and were subject to differing national legislations.

14. She recalled that the CMI Working Group of 1982, having considered current practice, its disadvantages, problems and alternative solutions, had concluded that solutions to current problems were more likely to be found in new insurance arrangements than in other possible reforms. She also referred to the persistent criticism and the long history of calls for abolition of the general average system from many well-known authorities.

15. In view of the above, the Group of 77 did not believe it appropriate for the Working Group to consider questions of reform or amendment of general average or the York-Antwerp Rules before a thorough investigation had been conducted into the feasibility of alternative systems. The Group of 77 fully supported the recommendations of the secretariat report on general average that the UNCTAD secretariat should, in consultation with CMI, approach insurance interests in order to set up an investigation to determine whether a more efficient and less costly insurance arrangement could be developed which would allow the abolition of the general average system. If this was found to be the case then investigations would have to be made into the best means of effecting abolition of the present system. If, on the other hand, insurance interests concluded that there was no feasible insurance solution it would then be appropriate for the Working Group to consider the question of simplification and reform of the general average system and the York-Antwerp Rules. The time was ripe to take a fresh look at this ancient institution, in view of the entry into force on 1 November 1992 of the United Nations Convention on the Carriage of Goods by Sea, 1978, known as the Hamburg Rules.

16. The representative of China said that the secretariat's report was a very valuable source of reference. He noted that general average was a very old maritime law, which had developed over the centuries and was now generally accepted by the maritime community. However, the general average system had become complicated and time-consuming. He also noted that for several years there had been many discussions on the question whether to abolish or retain the general average contribution system. Therefore, it was timely for the Working Group to consider the subject at its current session and China was prepared to participate actively in the hope of arriving at a successful outcome. At this stage, he felt that the discussions should not be focused on reviewing the general average system but rather on an exchange of views among various groups and delegations.

17. The representative of the secretariat of the International Maritime Organization (IMO) said that the subject of general average was of particular interest to IMO and its member Governments. She recalled that the Diplomatic Conference on Salvage, held in London in April 1989, had adopted the International Convention on Salvage and a resolution requesting the Secretary-General of IMO to take appropriate steps in order to amend the York-Antwerp Rules 1974 to ensure that special compensation paid under Article 14 was not subject to general average. In furtherance of that resolution, the Secretary-General of IMO had requested the Comité Maritime International (CMI) to take the necessary steps to amend the York-Antwerp Rules 1974. As a result, CMI had established an international subcommittee which had revised Rule VI of the York-Antwerp Rules, dealing with salvage. The new version of Rule VI had been adopted by CMI at its 34th international conference held in Paris in June 1990. She believed that the conclusions and recommendations emanating from the current session of the UNCTAD Working Group would have significance for IMO's future work and would contribute to the search for new ideas and procedures.

18. The observer for the Comité Maritime International (CMI), referring to successive revisions of the York-Antwerp Rules since they had been established at the third General Average Congress held in York in 1864, said that further revisions had been carried out by CMI in 1950 and 1974, with a small amendment in 1990 to ensure compatibility between the Rules and the 1989 London Salvage Convention. He added that the decision of CMI in December 1990 to undertake further review of the subject of general average and the York-Antwerp Rules was consistent with established tradition.

19. He considered that the report and the recommendations of the UNCTAD secretariat were very much to the point, and CMI was ready to work with the UNCTAD secretariat in making approaches to insurance interests in order to examine with them the potential for an insurance response to those commercial and legal issues currently covered by the general average system.

20. He said the subcommittee established by CMI to deal with the subject would start its work in early 1992 and the amended version of the Rules, if any, would be adopted by the CMI Conference in 1994. The York-Antwerp Rules were regarded as voluntary rules adopted at the level of a private organization and he hoped that they would keep that status. He pointed out that his organization was dealing only with the York-Antwerp Rules and not with the general average system as such. He felt that it was for the Working Group to determine whether further harmonization was needed.

21. The observer for the Baltic and International Maritime Council (BIMCO) said that his organization was very much involved as a matter of routine with general average. General average clauses were incorporated in bills of lading and charter parties as standard clauses. In its negotiations with charterers, shippers and receivers BIMCO had never come across a situation where someone had objected to the incorporation in a bill of lading or charter party of a general average clause. In his view there was no demand on the part of cargo or shipowners for abolition of the system. The strength of the York-Antwerp Rules lay in their worldwide acceptability and the facility with which the Rules could be amended thanks to their private nature. He added that there had been no judicial criticism of the general average system as such, and he did not believe that possible difficulties in understanding the general average system, as stated in the secretariat's report, was a valid argument for abolishing the system. He agreed that there was always room for improvement and simplification, but he insisted that any amendment to the York-Antwerp Rules should ensure that present universality would not be affected. Referring to the CMI subcommittee in charge of studying the York-Antwerp Rules, he stated that his organization did not object to the insurance investigations being carried out as proposed in the UNCTAD secretariat report.

22. The observer for the International Chamber of Shipping said that shipowners were not convinced that there was a need or wish to abolish the general average system. Criticisms of the system came mainly from academics and other non-practitioners. The York-Antwerp Rules were voluntary and if there had been widespread dissatisfaction with the system among the interests

involved, some other system would have been established, or indeed the parties concerned would have agreed that the Rules should not be applied, leaving the losses to lie where they fell. He pointed out that shipowners believed that there were still good reasons to retain the general average system, given the special characteristics of maritime transport. Having said that, he did not oppose revision or updating of the system if the Working Group so decided. Furthermore, he would not object to looking at alternative systems, such as insurance. However, he considered that it would be more logical for CMI to take the lead in any work on this issue, with wide participation including that of the UNCTAD secretariat and other interested parties. He expressed the interest of his organization in cooperating in any future work on this issue as representing one of the commercial parties responsible for the payment of general average contributions.

23. At the 99th plenary meeting on 15 November 1991, the Chairman introduced his draft report to the plenary on the work carried out by the subgroup of experts. (For the establishment of the subgroup of experts, see chap. II, section C). After a brief discussion, participants made a number of proposals for amendments to the draft report of the Chairman.

24. At the same meeting, the Working Group decided to establish a Contact Group of the Chairman to consider and finalize the text of a draft decision submitted by the Chairman on agenda item 3 (General average).

Action by the Working Group on International Shipping Legislation

25. At its 100th (closing) plenary meeting, on 19 November 1991, the Working Group adopted without amendment the draft report of the Chairman to the plenary on the work carried out by the subgroup of experts (TD/B/C.4/ISL/L.88) and the draft decision on "General average" submitted by the Chairman (TD/B/C.4/ISL/L.89). Both texts had been submitted as a result of informal consultations in the Contact Group of the Chairman. (For the decision on "General average", see annex I below. For the report of the Chairman on the work of the subgroup of experts, see annex II). 1/

Chapter II

ORGANIZATIONAL MATTERS

A. Opening of the session

26. The thirteenth session of the Working Group on International Shipping Legislation was opened on 11 November 1991 by Mr. K.-J. Gombrii (Norway), acting on behalf of the Chairman of the Working Group at its twelfth session.

B. Election of officers
(Agenda item 1)

27. At its 96th (opening) and 97th meetings, on 11 November 1991, the Working Group elected its Bureau, as follows:

Chairman:	Mr. Gabriel RIVERA MIRANDA	(Mexico)
Vice-Chairmen:	Mr. Mostafa WAGUIH ARAFA	(Egypt)
	Mr. Johan SYAHPERI	(Indonesia)
	Mr. Norifumi IDE	(Japan)
	Mr. Karl-Johan GOMBRII	(Norway)
	Mr. A.S. KOKIN	(USSR)
Rapporteur:	Mr. Somporn PAISIN	(Thailand)

C. Adoption of the agenda and organization of work
(Agenda item 2)

28. Also at its 96th meeting the Working Group adopted the provisional agenda in TD/B/C.4/ISL/57 and Corr.1. The agenda for the thirteenth session thus read as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. General average
4. Provisional agenda and date of the fourteenth session of the Working Group
5. Other business
6. Adoption of the report of the Working Group to the Committee on Shipping.

29. At the same meeting, in accordance with previous practice, the Working Group decided to establish a subgroup of experts to deal with the substantive work on general average (agenda item 3). The subgroup of experts met in private and the outcome of its discussions was considered by the Working Group at its 100th plenary meeting, on 19 November 1991.

30. In connection with the organization of work of the session, the spokesman for Group B (United Kingdom of Great Britain and Northern Ireland) stated that, while group B supported the setting up of the subgroup of experts, it wished to emphasize that the subgroup should deal solely with the substantive item of general average. The issue of further work to be undertaken by the UNCTAD secretariat, and in particular a resolution or any other form of agreement on further work, should be discussed by the plenary of the Working Group or by a negotiating group set up by the Chairman of the current session of the Working Group. He strongly emphasized that the question of further work should not be dealt with by the subgroup of experts, since the setting of the programme of work was a prerogative of Governments. Experts might make recommendations and Governments might wish to take such recommendations into consideration, but it was for government representatives to discuss and to decide on the future work programme of the Working Group.

D. Membership and attendance 2/

31. The following States members of UNCTAD members of the Working Group were represented at the session: Algeria; Belgium; Brazil; Cameroon; Canada; China; Côte d'Ivoire; Cuba; Egypt; Finland; Gabon; Germany; Ghana; Greece; Hungary; India; Indonesia; Iran (Islamic Republic of); Japan; Kenya; Kuwait; Liberia; Madagascar; Mexico, Morocco; Netherlands; Nigeria; Norway; Oman; Panama; Philippines; Portugal; Romania; Saudi Arabia; Spain; Sri Lanka; Syrian Arab Republic; Thailand; Turkey; Union of Soviet Socialist Republics; United Arab Emirates; United Kingdom of Great Britain and Northern Ireland; United Republic of Tanzania; United States of America.

32. The following other State member of UNCTAD participated in the session: Austria.

33. The Economic and Social Commission for Western Asia was represented at the session. The International Trade Centre UNCTAD-GATT was also represented.

34. The following specialized agency was represented at the session: International Maritime Organization.

35. The following intergovernmental organizations were represented at the session: Organisation for Economic Co-operation and Development; Organization of African Unity.

36. The following non-governmental organizations were represented at the session: General Category: International Bar Association. Special Category: Baltic and International Maritime Council; International Chamber of Shipping; International Maritime Committee; International Ship Suppliers Association.

E. Provisional agenda and date of the fourteenth session of the Working Group
(Agenda item 4)

37. At its 100th (closing) meeting, on 19 November 1991, the Working Group approved the draft provisional agenda for its fourteenth session submitted by the UNCTAD secretariat (TD/B/C.4/ISL/L.90). (For the provisional agenda, see annex III).

38. In connection with the date of its fourteenth session, the Working Group noted that, in accordance with the indicative calendar of UNCTAD meetings for 1992 approved by the Trade and Development Board at the first part of its thirty-eighth session, the fourteenth session of the Working Group would be held during the month of November 1992. The exact date would be communicated in due course, when the calendar of meetings had been reviewed by the Informal Group on Calender Matters.

F. Adoption of the report of the Working Group to the Committee on Shipping
(Agenda item 6)

39. Also at its 100th meeting, the Working Group adopted the draft report on its thirteenth session (TD/B/C.4/ISL/L.87) and authorized the Rapporteur to complete the final version of the report as appropriate.

Notes

1/ At the closing meeting, renarks of a procedural nature were made by the Group of 77, Group B and China. Pending delegation approval, those remarks will, if appropriate, be reflected in an addendum to the present report.

2/ For the list of participants in the thirteenth session of the Working Group, see TD/B/C.4/ISL/INF.14.

ANNEXES

Annex I

DECISION ADOPTED BY THE WORKING GROUP AT ITS THIRTEENTH SESSION

Decision 7 (XIII). General average

The Working Group on International Shipping Legislation

Decides:

1. To request the UNCTAD secretariat to approach, in close consultation with the Comité Maritime International (CMI), the insurance industry, including the International Union of Marine Insurance (IUMI), and international organizations representing commercial parties involved with general average, to study the extent to which insurance arrangements could simplify the operation of the general average system. The study should bear in mind the need to ensure equitable balance between the commercial interests and should consider, inter alia:

(i) The advantages and disadvantages of the use of absorption clauses in insurance policies;

(ii) The costs to the respective commercial parties of any new insurance arrangements;

2. To request the UNCTAD secretariat and CMI to consult insurance and other interests on the preparation of up-to-date statistics on general average, and in particular information on the time, place of adjustment (e.g. place or places where the contributory value is determined, enforcement of contributions, resort to court and applicable law and practice and preparation and publication of final adjustment) and expenses involved in general average settlements;

3. To request the UNCTAD secretariat to consult governments of developing countries and commercial interests involved with general average, in particular in developing countries, on their experience of general average and also to seek to obtain the statistics required under paragraph 2 through the same channels;

4. To request the UNCTAD secretariat to cooperate with, and contribute to, the ongoing work of CMI's International Sub-Committee on CMI's review and simplification of the current York-Antwerp Rules;

5. To consider the result of the study on insurance as set out in paragraph 1 and the information requested in paragraphs 2 and 3 of this decision at its fourteenth session;

6. To invite the UNCTAD secretariat to provide, within available resources, assistance upon request to governments concerning the law and practice of general average, including training and regional seminars;

7. To request the Trade and Development Board to endorse, at the second part of its thirty-eighth session, the report of the Working Group on International Shipping Legislation and the decision contained therein.

100th meeting
19 November 1991

Annex II

REPORT OF THE CHAIRMAN OF THE WORKING GROUP TO THE PLENARY ON THE WORK CARRIED OUT BY THE SUBGROUP OF EXPERTS*

1. The Subgroup of Experts held four meetings to carry out the substantive work on the subject of general average. General discussions held during those meetings highlighted the complicated and technical nature of the general average process. It was confirmed by a majority of delegations that the York-Antwerp Rules were voluntary and a matter for incorporation into contracts of carriage by the parties involved and it was desirable to maintain them as such. It was further noted that problems involved in the general average process, such as delay and expense, mainly related to liner trades and might not necessarily be relevant in other trades. The suggestion was therefore made that the interested parties might seek solutions on a sector-by-sector basis.

2. While some delegations believed that there were no problems involved in the operation of the general average system, most delegations felt that there was clearly room for simplification and improvement of the system. Some delegations highlighted the cumbersome, costly and time-consuming nature of the general average adjustment.

3. The Subgroup also held a preliminary exchange of views on some of the issues proposed by the Chairman in a working paper for discussion, which included the following:

(a) Criticisms listed by the IUMI General Average Committee referred to in paragraph 98 of TD/B/C.4/ISL/58, including such issues as large ships carrying many different cargoes; continuous extensions of the scope of general average; heavy clerical burden; currency exchange fluctuations; over-estimation of general average deposits; delays in winding up of general average; and lack of uniformity in interpretation of the York-Antwerp Rules.

(b) Time taken at different stages of the general average process:

- Collecting security,
- Preparing adjustment,
- Collecting contribution.

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* For the adoption of this report, see paragraph 25 above.

(c) Time taken by the general average process in different trades, for example bulk and liner trades.

(d) Expense involved in the preparation of average adjustments.

(e) Type of incidents giving rise to general average at present, for example, fire, stranding, jettison:

- Need for up-to-date statistics on points (b), (c), (d) and (e) above.

(f) Availability of expertise, i.e. average adjusters:

- Problems for developing countries.

(g) Problems involved in obtaining security - average bonds, underwriters' guarantees, bank guarantees and cash deposits.

(h) Absorption clauses inserted in hull policies providing for hull underwriters to pay for all losses up to a given level:

- Could they help reduce the number of small general average cases?

- Statistics needed to determine the appropriate level.

(i) Relevance of contract of carriage - impact of Hamburg Rules.

(j) Problems involved in collecting general average contribution. Refusal to pay contributions by cargo interests on grounds of unseaworthiness.

(k) Alternative schemes as described in TD/B/C.4/ISL/58.

(l) Need for investigation by the insurance industry.

4. From the views expressed by delegations, it became apparent that there was a need for up-to-date statistics and information on the number of issues listed such as the time and expense involved in the general average process, and the types of trade and incidents which gave rise to general average. It was considered desirable to recommend an investigation by the insurance industry and to obtain the relevant information before any further action was taken on this matter.

5. The discussions also revealed the lack of expertise in developing countries. It was therefore felt advisable to consider the organization of seminars in developing countries with a view to providing the necessary awareness as to the law and practice of general average.

6. The Subgroup also considered the question of absorption clauses which were inserted in hull policies to provide for hull underwriters to pay for all general average losses up to a certain level. It was confirmed that these clauses were already used in practice in some countries in order to avoid

general average adjustment or collecting general average contribution from the cargo interests in small cases where it was not commercially feasible to declare general average. Views were expressed on the advantages and disadvantages of such clauses. It was, however, felt that it would be advisable to leave the use of absorption clauses and their appropriate level to be determined by the commercial parties involved.

7. The impact of the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) on general average was also briefly discussed. While it was admitted that the Hamburg Rules and the York-Antwerp Rules could coexist, it was recognized that the full impact of the Hamburg Rules could only be assessed once they entered into force.

8. The Chairman of the Subgroup of Experts therefore felt that it would be premature for the Working Group to take any further action until its fourteenth session, when it was expected that the results of the further investigations would be available.

Annex III

PROVISIONAL AGENDA FOR THE FOURTEENTH SESSION OF THE WORKING GROUP*

1. Election of officers
2. Adoption of the agenda and organization of work
3. General average
4. Provisional agenda and date of the fifteenth session of the Working Group
5. Other business
6. Adoption of the report of the Working Group to the Committee on Shipping.

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* As approved by the Working Group at its 100th meeting (see para. 37 above).